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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS BRANDON CHEW, Defendant and Appellant.	C088151 (Super. Ct. No. 17FE015431)

Defendant Nicholas Brandon Crew seeks remand to afford him the opportunity to ask the trial court to strike his five- year sentencing enhancement imposed under Penal Code, section 667, subdivision (a)(1).[1] We agree that remand is warranted.

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[1] Further undesignated statutory references are to the Penal Code.

DISCUSSION

Defendant was sentenced in October 2018. The law at that time did not allow the trial court to strike a serious felony prior used to impose a five-year enhancement under section 667, subdivision (a)(1). Senate Bill No. 1393 (2017-2018 Reg. Sess.) amended the statute to remove this prohibition effective January 1, 2019. (Stats. 2018, ch. 1013, §§ 1, 2.)

Relying on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), defendant argues these amendments apply to him because his judgment is not yet final. In *Estrada* our Supreme Court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id*. at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid*.) Thus, under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to apply retroactively to cases not yet final on appeal. (*Id*. at pp. 747-748; *People v. Brown* (2012) 54 Cal.4th 314, 324.) Our Supreme Court has also applied the *Estrada* rule to amendments giving the trial court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 76.)

The Attorney General concedes the rule of *Estrada* requires retroactive application of Senate Bill No. 1393 to defendant's case, but argues remand is nevertheless unnecessary. He argues that the trial court expressly considered numerous aggravating factors at sentencing, in particular defendant's lack of remorse and the violent nature of the crime itself. The Attorney General also notes the trial court nearly imposed the upper term, but instead imposed the middle term. Thus, the Attorney General argues, "by noting that it almost imposed the upper term, but did not, the court indicated that it

thought that the total number of years, which included the five-year term, was appropriate."

We are not persuaded. As our colleagues at the Second Appellate District recently observed, "what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.) Moreover, whatever the trial court was considering, it did not impose the maximum available term. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 419.) Under these circumstances, we shall not assume the trial court would not have exercised its discretion to strike the prior serious felony conviction, if the court had the discretion to do so. If the court decides to strike the prior conviction, it may resentence on the counts of conviction and remaining enhancement, should it choose to do so. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893 [explaining the "full resentencing rule"].)

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the exercise of sentencing discretion as to whether to strike the prior conviction and resulting five-year enhancement under section 667, subdivision (a)(1). In all other respects, the judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Robie, Acting P. J.

/s/
Hoch, J.